

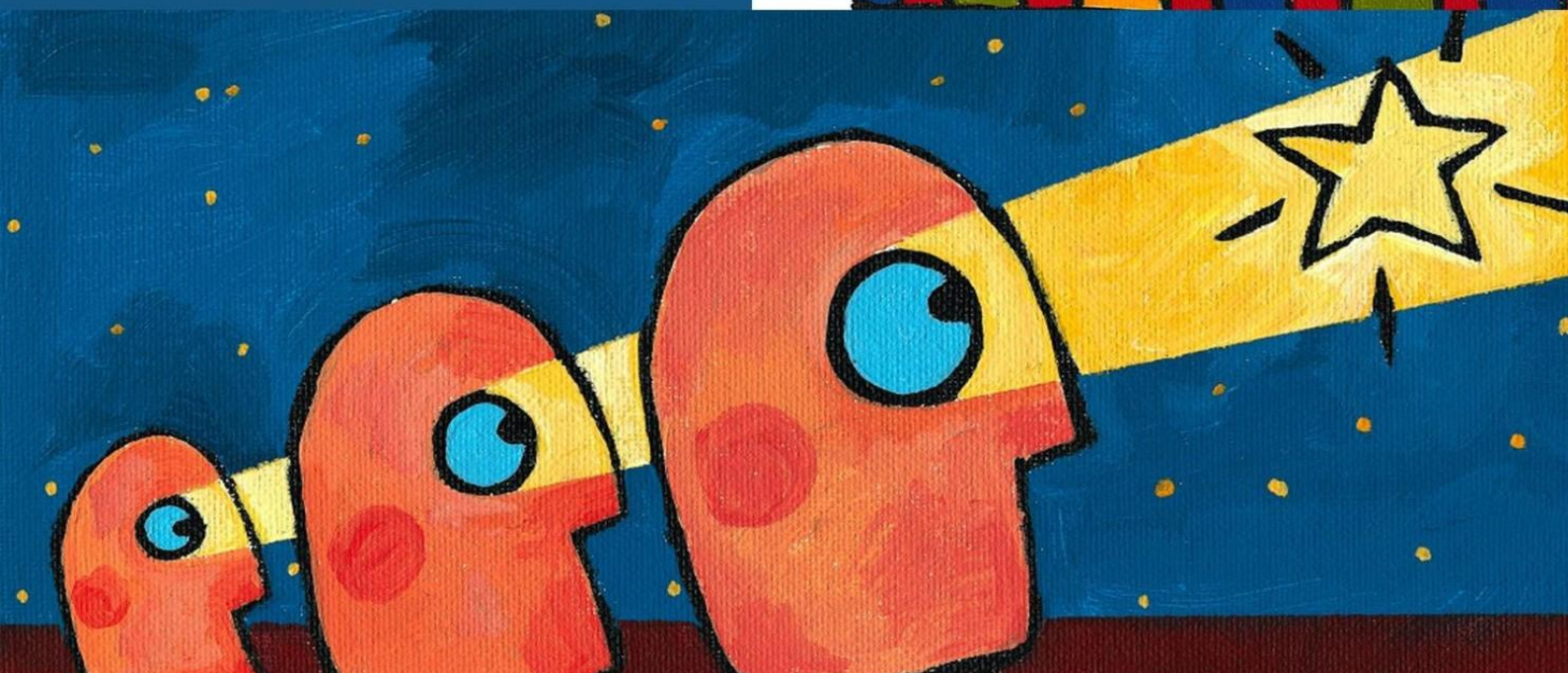


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NCLAT Upholds CCI's Decision in PVR-Inox Case

The National Company Law Appellate Tribunal ('NCLAT') has upheld the decision of Competition Commission of India ('Commission'/'CCI'), not directing investigation into the alleged anti-competitive agreement between PVR Limited ('PVR') and INOX Leisure Limited ('Inox') which was the basis of merger between the two.

The Appellant/Informant had filed an information before the Commission alleging contravention of Section 3(1) of the Competition Act, 2002 ('the Act') against PVR and Inox. It was alleged that PVR and Inox had entered into an anti-competitive agreement by which they have agreed to merge as a combined entity – 'PVR INOX Ltd.', which in future will become dominant under Section 4 of the Act, and is likely to cause Appreciable Adverse Effect on Competition ('AAEC') in the market for the "*exhibition of films in multiplex theatres and high-end single screen theatres in different cities in India*". The merger transaction was exempted from mandatory notification requirement, under Section 5 of the Act, as it qualified for the *de minimus* exemption owing to a fall in turnover of Inox due to the Covid-19 pandemic.

The Commission, however, in its order closed the information under Section 26(2) of the Act, holding that the case is entirely based out of apprehensions and not on evidence establishing likelihood of AAEC. Further, the Commission noted that this kind of assessment is ex-ante which can be undertaken in appropriate cases when legal requirement for such examination would attract. However, the conduct of an anti-competitive nature was found missing in the present case for an analysis from the perspective of provisions of Section 3 or 4 of the Act.

The NCLAT, in its judgment, noted that the case relates to the scheme of merger by absorption, regulated by Section 6 and not by Section 3(1) of the Act, which deals with anti-competitive agreements. Further, the NCLAT, noting that Section 3(1) of the Act deals with anti-competitive agreements where both the parties to the agreement retain their separate identities and not where entities lose their individual corporate status, as in the present case, held that no information under Section 19(1)(a) of the Competition Act can be entertained in the present situation. Thus, the NCLAT dismissed the Appeal.

(Order dated 10.08.23)

ANZ's Acquisition of Suncorp Bank Blocked by ACCC

The Australian Competition & Consumer Commission ('ACCC') has decided to block Australia and New Zealand Banking Group Limited ('ANZ') to proceed with its proposed acquisition of Suncorp Bank ('Suncorp'). The ACCC stated that the transaction, if allowed, is likely to substantially lessen competition in supply of home loans in Australia, small & medium enterprise banking and agribusiness banking in the State of Queensland.

ANZ – Acquirer – is an Australia based multi-national banking and financial services company. Suncorp – Target – is the banking arm of the Suncorp Group which also owns and operates insurance businesses in Australia and New Zealand.

The ACCC noted that supply of home loans, small & medium enterprise banking and agribusiness banking markets are critical for many homeowners and for business and farmers in particular, of Queensland. In these markets, second-tier banks such as Suncorp Bank are important competitors especially considering the high barriers to entry in the Banking Sector. As per the reports, even the major banks consider these second-tier banks as a competitive threat. Therefore, if the acquisition is allowed, then it will further entrench the oligopolistic banking market of Australia, which is concentrated among only four major banks i.e., National Australia Bank, Commonwealth Bank of Australia, Westpac and ANZ Bank.

Further, as per the ACCC, the Australian home loans market is already at risk of coordination among the major banks due to their ability to price signal, stability in market structure, similarity in terms of size and structure and high barriers to entry. The proposed combined entity will have a market share more than National Australia Bank and closer to other two major banks; and owing to less incentive to alter the status quo and lack of aggressive competition to gain market share there is increased likelihood of coordination in the Banking Industry. Additionally, the ACCC looked into the relevant counterfactual that could exist in absence of this proposed transaction. Further, based on the witness statements, expert reports, internal emails and documents and deposition of executives, it was observed that there is a realistic prospect that the Suncorp Bank might exercise the option of combining with other players – Bendigo and Adelaide Bank.

The ACCC in terms of public benefits observed that, although ANZ would benefit from cost savings and prudential benefits arising out of the proposed acquisition however, these benefits do not outweigh the likely detriments, particularly competitive detriments likely to result from the proposed acquisition.

(Press release dated 04.08.23)



Heard at the BAR

*Legal news from
India and the world*

ACCC Imposes \$10M Penalty on Dell Australia for Deceptive Discount Prices on Computer Monitors

A Federal Court proceeding instituted by ACCC against Dell Australia Pty Ltd. (**'Dell'**) has found the company to be engaging in making false and misleading representations on its website about discount prices for add-on computer monitors.

The infringer, Dell, is a wholly owned subsidiary of Dell Technologies Inc., a US-based technology company, that operates globally primarily through its website and develops, sells, repairs, and supports computers and related products.

During proceedings before the Federal Court, Dell admitted that through its conduct Dell misled customers about the price of a selection of monitors available to 'bundle' with purchase of a desktop, laptop or notebook. The representations made by Dell misled customers about the discounted price through statement like "*Total Savings*", "*Includes x% off*", "*Discounted Price*" and "*Get the best price for popular accessories when purchased with this product*".

According to the ACCC these monitors were often advertised with a higher 'strikethrough' price as these monitors were not sold for the strikethrough price for most of the relevant time.

Dell admitted that such a conduct by it resulted in overstating of discounts....

(Continued on next page)

CCI Imposes "Cease and Desist" Order on Chemist Association's Cartel

The CCI based on Information filed by a pharmaceutical products supplier investigated into the cartelistic behaviour of two Chemist Associations in the District of Sri Ganganagar, Rajasthan and has found them in contravention of Section 3(3)(a) & Section 3(3)(b) r/w. Section 3(1) of the Act.

The Information was filed by a supplier and contract manufacturer of pharmaceutical products and generic medicines. According to the Informant, the two Chemist Associations operating in Sri Ganganagar district of Rajasthan, one at Tehsil level and the other at District level, have been engaged in anti-competitive practices by collectively boycotting the pharmaceutical products of certain suppliers including the Informant. *Modus operandi* of these Chemist Associations was allegedly to collectively decide and impose margins & incentive schemes on the suppliers of pharmaceutical products, the non-adherence of which, by the suppliers, resulted in a collective boycott of their products by Chemists associated with the Association. Acting under the same, the Tehsil-level Chemist Association and the District-level Chemist Association issued notices on 07.06.2020 and 17.06.2020, respectively, calling in for collective boycott of the Informant's product in all markets of Sri Ganganagar District, Rajasthan.

The CCI in its *prima facie* view was of the opinion that the notices issued by these two Chemist Associations were in the form of diktats for boycotting products supplied by the Informant. As a result, it led to limiting & controlling supplies of drugs. Thus, the Commission *prima facie* found violation of Section 3(3) of the Act by the Chemist Associations and directed Director General (**'DG'**) for investigation.

The DG during investigation, through documentary evidences, WhatsApp

communications among the members of the two Chemist Associations and statements made by the office bearers of the Associations, found the Chemist Associations in violation of the Act. The DG observed that the Chemist Associations were working as a cartel of Chemists for implementation of their common agenda against the Informant through boycott and blockade of Informant's products, thus, violating Section 3(3)(a) & (3)(b) r/w. Section 3(1) of the Act.

The Commission in its order observed that the price includes any consideration, direct or indirect, which in effect relates to the sale of any goods. Therefore, the determination of prices or supplies including any manifestation of control over prices seeking higher margins and control over Stockists, such as in the present case, have an effect on the price & supply of the product in the market and the same is within the ambit of Section 3(3)(a) & Section 3(3)(b) of the Act. Further, the Commission relied on the replies made by the office bearers i.e., President of the Chemist Associations to the questionnaire put forth by the DG, which purported that the decision of boycott was perpetrated against the Informant.

Therefore, concurring with the findings of the DG, the Commission was of the opinion that both the notices issued by the Chemist Associations were in the form of decision/diktats of boycotting Informant's products, which is per se anticompetitive under Section 3(3) of the Act. The Commission, on considering the scope of operation of the notices issued, held that it cannot be said that these notices did not cause or not likely to have caused AAEC in the market. Therefore, the CCI found contravention of Section 3(3)(a) & Section 3(3)(b) r/w. Section 3(1) of the Act against the Chemist Associations and its President. However, the Commission refrained from imposing any penalty on the Chemist Associations or its President and passed only a 'cease and desist' order.

(Order dated 23.08.23)

than what the customers received. Further, at times, consumers had to pay more than what they would have paid for purchase of the monitor as a standalone product. Earlier, the Court had also ordered Dell to offer refunds and issue corrective notices to every affected consumer.

(Press release dated 14.08.23)

The CCI Published New Draft Competition Commission of India “Settlement” and “Commitment” Regulations, 2023

The CCI has published the draft Competition Commission of India (Settlement) Regulations, 2023 (“**Draft Settlement Regulations**”) and draft Competition Commission of India (Commitment) Regulations, 2023 (“**Draft Commitment Regulations**”) to give effect to the “Settlement & Commitment Mechanism”, as introduced by the newly added Section 48A and Section 48B of the Act, respectively. The Draft Regulations sets out the procedure for filing of settlement and commitment applications and for conducting the settlement and commitment proceedings.

The settlement and commitment applications can be made for inquiries initiated under Section 26(1) of the Act for alleged contravention of Section 3(4) or Section 4. Therefore, no settlement or commitment application can be made for proceedings initiated for contravention of Section 3(3) of the Act. Further, the applicants are entitled to withdraw their application, at any time, before the issuance of order accepting or rejecting settlement/commitment application by the Commission.

The key highlights of the Draft Settlement Regulations are that: **i)** a settlement application may be filed, at any time, before the expiry of 45 days from the date of receipt of DG Report under Section 26(4); **ii)** the entire settlement proceedings shall be concluded within 120 days from the date of receipt of the settlement application, failing which the inquiry against the settlement applicant shall resume; **iii)** the settlement amount computed by the CCI, as per guidelines given in the regulations, in addition to the corrective measures proposed by the applicant, may extend upto the maximum amount of penalty leviable under Section 27(b) of the Act. Further, the applicant has 15 days to provide its acceptance to the settlement amount from the receipt of its communication; **iv)** the CCI may give a settlement discount of maximum 15% on the settlement amount.


The key highlights of the Draft Commitment Regulations are that: **i)** the applicant may submit his application, at any time, after an order under section 26(1) of the Act has been passed by the CCI, but before either expiry of 45 days from the date of receipt of order under Section 26(1) of the Competition Act or prior to receipt of DG report under Section 26(4) of the Act by the parties; **ii)** the entire commitment proceedings shall be concluded within 90 days from the date of receipt of the commitment application failing which the inquiry against the commitment applicant shall be resumed.

Further, the CCI must convene an ordinary meeting within 7 days to evaluate the settlement/commitment application and if the Commission is *prima facie* not satisfied with the settlements/commitments offered by the applicant then a 15 days period is accorded to the applicant to revise its application. After completion of the revision process the application is placed for consideration before the CCI and till the disposal of the application the inquiry pending against the applicant will be kept in abeyance. The Commission after conducting the settlement/commitment proceedings may either: **i)** grant approval to the proposed settlement or commitment under Section 48A(3) or 48B(3) respectively; or **ii)** reject the proposed settlement or commitment under Section 48A(5) or 48B(5) respectively. Moreover, the CCI can also revoke its settlement/commitment order by initiating proceedings under Section 48C of the Act if the settlement/commitment applicant fails to comply with the settlement/commitment order or that it comes to the notice of the Commission that the settlement/commitment applicant has not made full and true disclosure or there has been material change in facts.

(Draft Settlement Regulations)
(Draft Commitment Regulations)

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